Supreme Court, U.S.
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No. 08-700

IN THE
Supreme Court of the United States

ALAN MACKERLEY,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT MISAPPLIED *KIMMELMAN v. MORRISON*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), WHEREIN THIS COURT RECOGNIZED THAT TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE CONSTITUTES A GROUND FOR HABEAS CORPUS RELIEF UNDER THE SIXTH AMENDMENT, AS WELL AS THE STANDARDS FOR DETERMINING INEFFECTIVENESS AS PROMULGATED IN *STRICKLAND v. WASHINGTON*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), BY FINDING NO SIXTH AMENDMENT VIOLATION DESPITE THE FAILURE OF PETITIONER'S COUNSEL TO SEEK SUPPRESSION OF WIRETAP EVIDENCE WHERE A VIOLATION OF THE STATE WIRETAP STATUTE'S NECESSITY REQUIREMENT WAS EXPOSED AT A PRETRIAL SUPPRESSION HEARING THROUGH THE TESTIMONY OF THE AFFIANT TO THE WIRETAP APPLICATION AND WHERE THE STATUTE REQUIRES MANDATORY SUPPRESSION FOR SUCH A VIOLATION.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Mackerley v. Secretary, Department of Corrections*, 2008 WL 2610768 (11th Cir. 2008), affirming the denial of the petitioner's 28 U.S.C. § 2254 habeas corpus petition by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. 1-5).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on July 3, 2008. (App. 1-5). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to November 30, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Following his first jury trial in a Florida state court, the petitioner was convicted of first degree murder and kidnaping as charged. On direct appeal, the kidnaping conviction was reversed based upon insufficient evidence and the murder conviction was reversed and remanded for a new trial. *Mackerley v. State*, 754 So. 2d 132 (Fla.4th DCA 2000) [*Mackerley I*], quashed in

part, *Mackerley v. State*, 777 So. 2d 969 (Fla.2001). On remand, the petitioner was retried by jury solely upon the charge of first degree murder. The second trial resulted in a jury deadlock and declaration of a mistrial. Following a third trial, the petitioner was found guilty as charged and sentenced to life imprisonment. On direct appeal, his conviction was affirmed. *Mackerley v. State*, 900 So. 2d 662 (Fla.4th DCA 2005) [*Mackerley II*].

The petitioner filed in the state trial court a motion seeking postconviction relief based upon ineffective assistance of trial counsel in violation of the Sixth Amendment to the Constitution of the United States. (App. 6-18). The motion alleged that the petitioner's trial counsel failed to present a meritorious ground for suppression of wiretap evidence, namely, that the state violated the so-called necessity requirement of the Florida wiretap statute which, under the statute's mandatory and absolute exclusionary provision, required suppression. The violation was revealed at the pretrial suppression hearing when Agent Driscoll, the affiant on the wiretap application, testified that the state's key witness, William Anderson, who was discovered as a direct result of the wiretap, would have been located without the wiretap had traditional investigative techniques not been abandoned in favor of the wiretap. The motion for postconviction relief was summarily denied. (App. 19-21). On appeal by the petitioner challenging the denial of his Sixth Amendment right to effective assistance of counsel, the appellate court affirmed without opinion. *Mackerley v. State*, 930 So. 2d 629 (Fla.4th DCA 2006) [*Mackerley III*].

Having exhausted in the state courts his Sixth Amendment claim, the petitioner filed a petition for writ of habeas corpus in the United States District

Court raising the ineffective assistance of trial counsel challenge. (App. 22-34). The United States Magistrate Judge issued a Report and Recommendation recommending that the petition be summarily denied. (App. 35-47). After the petitioner filed objections, the district judge entered an order summarily denying the petition for writ of habeas corpus, overruling the petitioner's objections, and approving the Magistrate Judge's Report and Recommendation to the extent it was consistent with the district judge's order. (App. 48-59). The district judge granted the petitioner's motion for certificate of appealability and the Eleventh Circuit affirmed. (App. 1-5).

The Eleventh Circuit held that the necessity requirement violation revealed at the suppression hearing did not trigger any responsibility of the petitioner's counsel to seek suppression on that ground. Rather, the Eleventh Circuit reasoned that in order to satisfy the necessity requirement of the Florida wiretap statute, the applying officers need only aver "at the time of application why traditional investigative techniques are unlikely to succeed." (App. 5). The Eleventh Circuit went on to conclude that Driscoll's testimony that traditional investigative techniques would have succeeded had the wiretap not been sought and obtained "is not relevant to the necessity of the wiretap in the first instance" and that counsel was not ineffective for having "failed to attack the wiretap evidence on necessity grounds." *Id.*

The petitioner seeks certiorari review.

ARGUMENT

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, the petitioner must show both that his counsel's performance was

constitutionally deficient and that he was prejudiced by his counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner satisfies the prejudice element by showing that "there is a reasonably probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Trial counsel's ineffectiveness for failure to properly move to suppress evidence is a ground for habeas corpus relief. See *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). This principle applies to habeas corpus relief sought by a state prisoner under the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], 28 U.S.C. § 2254. See *e.g., Thomas v. Varner*, 428 F.3d 491 (3d Cir.2005) (counsel's failure to object or file motion to suppress in-court identification was not objectively reasonable); *Howard v. Bouchard*, 405 F.3d 459 (6th Cir.2005) (trial counsel's failure to move to suppress identifications fell below reasonable professional standards); *Northrop v. Trippett*, 265 F.3d 372 (6th Cir.2001) (trial counsel ineffective in failing to move to suppress drug evidence); *Cossel v. Miller*, 229 F.3d 649 (7th Cir.2000) (counsel ineffective for failing to object to in-court identification of defendant); *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir.1990) (same as *Cossel*).

There are three elements for relief under this Court's decision in *Kimmelman*. A petitioner must prove (1) that counsel's representation fell below an objective standard of reasonableness, (2) that the claim for suppression is meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence.

In this case, the Eleventh Circuit held that petitioner's counsel was under no obligation to raise the violation of the necessity requirement that became

evident at the suppression hearing because the determination whether the sworn application for wiretap order was in compliance with that requirement turned solely upon review of the application without any regard for the affiant's testimony at the hearing on the issue. This view of the duties of defense counsel at the wiretap suppression hearing is at odds with the record, Florida wiretap law, and the Sixth Amendment jurisprudence of this Court. The only witness at the pretrial suppression hearing, State witness Agent Driscoll, presented a compelling case that he violated the Florida wiretap statute's so-called necessity requirement. A wiretap order cannot issue under Florida's wiretap statute in the absence of a showing of "necessity." Sections 934.09(1)(c) and (3)(c), Florida Statutes, mandate a showing of necessity. Section 934.09, entitled "Procedure for Interception of Wire or Oral Communications", provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. *Each application shall include the following information:*
>
> ***
>
> (c) *A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;*
>
> ***
>
> (3) *Upon such application, the judge may enter an ex parte order,* as requested or as modified, *authorizing or approving interception of wire or oral communications* within the territorial jurisdiction

of the court in which the judge is sitting *if the judge determines on the basis of the facts submitted by the applicant that:*

***

(c) *Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;....*" (Emphasis supplied).

The Florida wiretap statute expressly requires the mandatory exclusion of evidence derived from any improper interception. Section 934.06 provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter." "This statutory exclusion is absolute." *Jackson v. State*, 636 So. 2d 1372, 1374 (Fla.2d DCA 1994), approved *State v. Jackson*, 650 So. 2d 24 (Fla.1995).

Thus, in *State v. Garcia*, 547 So. 2d 628 (Fla.1989), the Supreme Court of Florida held that the good faith exception to the judicially-crafted Fourth Amendment exclusionary rule authorized by this Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) does NOT apply to the statutorily-mandated exclusionary provision of the Florida wiretap statute. See also *Davis v. State*, 529 So. 2d

732, 735 (Fla.4th DCA 1988), approved in *State v. Garcia, supra* ("By setting forth in unequivocal language that the suppression of evidence is the consequence of an illegal wiretap, the Legislature removed from judicial purview, the authority to alter the statutory scheme by creating a good faith exception.") Because only the Florida Legislature can promulgate exceptions to the statute's exclusionary rule, it necessarily follows that the so-called "inevitable discovery" exception announced by this Court in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), another judicially-crafted exception to the fourth amendment exclusionary rule, would not apply as well. See *e.g., State v. Daugherty*, 931 S.W.2d 268 (Tex.Cr.App.1996) (the inevitable discovery exception does not apply to a state statutory exclusionary rule).

The petitioner's trial counsel moved to suppress the fruits of the wiretap solely on the grounds of lack of probable cause and lack of compliance with the minimization requirement of the Florida wiretap statute. Petitioner's trial counsel failed to raise lack of compliance with the necessity requirement in his written pretrial motion to suppress, at the suppression hearing, or anytime thereafter. Contrary to the implication of the decision of the Eleventh Circuit, the face of the wiretap affidavit did indeed reveal grounds for preserving such a claim -- the affiant, Agent Driscoll, acknowledged in the affidavit that the wiretap was sought early in the investigation, even prior to investigation of the results of a pen register -- thereby placing petitioner's counsel on notice that the wiretap was sought before alternative investigatory techniques had been exhausted. Regardless of whether petitioner's counsel should have raised the issue in the written motion, there is no doubt that counsel provided ineffective assistance of counsel by failing to raise the

issue once Agent Driscoll effectively admitted the necessity requirement violation in his testimony. The agent's pertinent testimony was adduced as follows:

> PROSECUTOR: Okay. Normal investigative procedures, would that include subpoenaing telephone records?
>
> AGENT DRISCOLL: Yes.
>
> PROSECUTOR: Finding out who the suspect is calling?
>
> AGENT DRISCOLL: Yes.
>
> PROSECUTOR: Interview all known associates of the suspect?
>
> AGENT DRISCOLL: Almost all, as many as we can.
>
> PROSECUTOR: Had you not gone up on the wiretap, would you have done those normal investigative procedures and techniques?
>
> AGENT DRISCOLL: Yes, of course.
>
> PROSECUTOR: And would you have inevitably discovered and interviewed Bill Anderson?
>
> AGENT DRISCOLL: Yes.
>
> PROSECUTOR: Any doubt in your mind about that?
>
> AGENT DRISCOLL: None whatsoever.

(App. 9).

The necessity violation was further buttressed by Agent Driscoll's additional testimony that the decision to seek a wiretap was made at the "very, very early stages of the investigation." (App. 9).

As noted, the district judge denied the petitioner's Sixth Amendment claim on the merits. The district judge found that Agent Driscoll's testimony failed to show a violation of the necessity requirement. Thus, the petitioner was denied relief because he had failed to prove the second element of *Kimmelman*, namely, that the claim for suppression was meritorious. The district judge stated: "[T]he fact that Mr. Anderson

may have eventually been found through other avenues does not demonstrate that other investigative means had not been sufficiently tried and failed for purposes of satisfying the necessity requirement." (App. 51). The Eleventh Circuit engaged in a similar analysis, concluding that whether Driscoll later acknowledged in his testimony that alternative investigative means would have succeeded "is not relevant to the necessity of the wiretap in the first instance." (App. 5).

The district court and Eleventh Circuit misconstrued the petitioner's Sixth Amendment claim and misapplied *Kimmelman*. The petitioner's claim is neither the speculative contention nor post factum suggestion framed by those courts. Rather, the petitioner's ineffective assistance of counsel challenge springs from Agent Driscoll's testimony acknowledging that he failed to try traditional investigatory techniques such as interviews, telephone records subpoenas, follow-up investigations of records, and the like, prior to seeking a wiretap order, and the agent's further acknowledgment these alternatives to a wiretap would have succeeded but were abandoned at the outset of the investigation in favor of a wiretap application. These crucial aspects of Agent Driscoll's testimony must be addressed if the petitioner's claim is to be adjudicated properly. When all of Agent Driscoll's testimony is considered, it is evident that the necessity requirement was indeed violated and that petitioner's counsel was asleep at the wheel when the violation became apparent. In fact, it is difficult to imagine a more vivid concession of such a violation by an affiant to a wiretap application that would trigger a defense attorney's obligation to raise the error on behalf of the client.

The AEDPA provides in pertinent part that a state

prisoner is entitled to federal habeas corpus relief upon a showing that the state's adjudication of his federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ..." or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1), (2). Also, a decision is "contrary to" federal law if the state court proceedings result in the application of a legal principle different from the governing principle set forth in Supreme Court cases. *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002).

The only state court determination addressing the petitioner's claim is that of the postconviction trial judge who rejected the claim solely upon the ground that the petitioner's "claim was considered and rejected" by the Fourth District in the petitioner's direct appeal from his conviction. (App. 21)). A petitioner is entitled to federal habeas relief if the state court's finding is clearly and convincingly shown to be unreasonable. See 28 U.S.C. § 2254(d)(2), (e)(1)). That showing is made here as follows.

In his direct appeal of his conviction to the Fourth District Court of Appeal, the petitioner raised three grounds for reversal that had been preserved for review by his trial counsel: the erroneous admission of scientific evidence; the absence of probable cause for the wiretap order; and the admission of prior consistent statements of Anderson. The petitioner attempted to seek reversal by also arguing the violation of the necessity requirement. However, the petitioner's trial counsel failed to preserve that issue for review and the state appellate court, the Fourth

District, is prohibited, by its own precedent, from reaching the merits of a challenge to a suppression order on a ground not raised by trial counsel in the motion to suppress. See *Johnson v. State,* 888 So. 2d 122 (Fla. 4th DCA 2004).

Accordingly, when the Fourth District affirmed the petitioner's conviction, its opinion, consistent with *Johnson*, only addressed the three issues that were preserved for review by the petitioner's trial counsel. *Mackerley II.* The unpreserved issue -- the violation of the wiretap statute's necessity requirement -- was the sole issue not addressed by the Fourth District in its opinion because that issue could not be presented for consideration by the Fourth District having not been raised by petitioner's trial counsel in the motion to suppress. *Johnson, supra.* Thus, the state postconviction judge's finding that the Fourth District "considered and rejected" the necessity violation has been clearly and convincingly shown to be a legal impossibility under Fourth District jurisprudence. Thus, the state postconviction judge's finding certainly meets the AEDPA's standard of unreasonableness, thereby permitting federal habeas corpus relief for the petitioner's claim of ineffective assistance of trial counsel under 28 U.S.C. § 2254.

In sum, it is elementary that a competent criminal defense attorney seeking to suppress the fruits of a wiretap will raise all viable grounds for relief. In Florida, liberal discovery rules in criminal cases, see Florida Rule of Criminal Procedure 3.220, will generally reveal prior to trial all viable grounds for suppression. In other cases, such as this one, grounds for suppression may also arise at the pretrial suppression hearing. The petitioner's trial counsel was ineffective both prior to and at the hearing, but especially at the hearing, by failing to present a

meritorious ground for suppression, namely, the violation of the necessity requirement of the wiretap statute which, under the mandatory exclusionary provision of the Florida wiretap statute, mandated suppression. The petitioner established a meritorious Sixth Amendment violation consistent with *Kimmelman* and the requirements of the federal habeas corpus statute.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted

Respectfully submitted,

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